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In the Supreme Court of the United States

OCTOBER TERM 1960

No. 329

THE UNITED STATES OF AMERICA, as trustee for the sole use and benefit of the General Post Fund, Petitioner

v.

THE STATE OF OREGON, acting by and through the State Land Board, Respondent

In the Matter of the Estate of Adam B. Warpouske, Deceased; Portland Trust & Savings Bank, Administrator of the Estate of Adam B. Warpouske, Deceased

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

Under the circumstances of this case, the questions presented by petitioner for writ of certiorari, in substance, appear to be:

1. Whether the provisions of 38 U.S.C. (1952 ed.) 17-17j are founded upon contract and thus do not apply to a mentally incompetent veteran, incapable of contracting, dying intestate and without heirs while being cared for in a Veterans' Administration hospital, admitted to such hospital without a guardian of his person to represent him or commitment by a court.

2. Whether Congress can constitutionally provide for

the automatic vesting in the United States of the personal property of a veteran dying intestate and without heirs upon the condition of care being furnished him by the Veterans' Administration hospital.

STATEMENT OF CASE

By this petition for writ of certiorari the United States seeks review of the decision of the Oregon Supreme Court affirming the decree of the State Circuit Court escheating to the State of Oregon for the benefit of the Common School Fund that portion of the estate of Adam Warpouske, deceased, derived from the estate of his deceased brother.

The case arises out of competing claims of the United States and the State of Oregon presented to the Probate Department of the Circuit Court for Multnomah County in the administration of Warpouske's estate. The United States claimed under 39 U.S.C. (1952 ed.) 17-17j (App. A), which provides for vesting in the United States, as trustee of the general post fund, of personal property of veterans dying intestate and without heirs while being cared for in a Veterans' Administration facility or hospital. The State of Oregon rested its claim upon Oregon Revised Statutes 120.010 (App. B) which provides for escheat to the State of Oregon for the benefit of the Common School Fund of estates of persons dying intestate and without heirs.

The facts relating to this mentally incompetent veteran are unique. Warpouske had a long history of mental illness antedating any admission of him to a Veterans'

Administration facility or hospital. In addition to this, at the time of his admission to the Veterans' Administration Hospital at Portland, he was in a comatose or semi-comatose condition and remained in such condition until his death. No guardian of his person was ever appointed to represent and act for him, nor was there any order of a court committing or directing his admission to the facility.

Warpouske was a veteran of World War I and a resident of Portland, Oregon. On December 31, 1955, he suffered a cerebral hemorrhage and hip fracture and was taken to the Good Samaritan Hospital (R. 49, p. 18). Appearing to be without funds, he was moved to the Multnomah County Hospital a few days later (R. 49, p. 18). He remained at this hospital until March 1, 1956, when he was transferred to the Veterans' Administration Hospital at Portland where he died on March 19, 1956 (R. 49, p. 18).

The cerebral hemorrhage rendered him unconscious and he remained unconscious or at best at times semi-conscious until his death. In the opinion of the physician attending him at the Multnomah County Hospital, Warpouske probably did not know where he was or whether he was being transferred to the Veterans' Hospital (Stipulation, Jmt. Roll, Paper No. 33; also Ex. 8). The Veterans' Hospital record states there was no clearing of his sensorium (Ex. 8).

Shortly before he died, it was learned that Warpouske had become the sole heir of his deceased brother whose estate netted the sum of $12,727.67 (R. 34). He never

was aware of this inheritance. On March 9, 1956, the Portland Trust Bank was appointed guardian of Warpouske's estate to receive this inheritance for him from his brother's estate in Wisconsin (R. 13, p. 16). No guardian of Adam Warpouske's person was ever appointed.

The only other assets in Warpouske's estate were unexpended federal pension funds of a net sum of $971.47 (R. 34) and small items of personal property valued at $28.

Upon the trial of the claim of the United States and the petition for escheat of the State of Oregon in the probate court, the United States produced its entire Veterans' Administration file covering Warpouske. The court directed the attorneys for the respective parties to select from the file such relevant and material portions as each might wish to introduce in evidence. The exhibits extracted disclosed a long history of mental illness and mental deficiency for Warpouske predating any admission to a veterans' facility. A report covering an examination in connection with Warpouske's admission to a veterans' hospital in May 1933 diagnosed his mental condition as dementia praecox, hebephrenic type, existing as early as 1924 and very likely prior to that date (Ex. 3). Other reports classified him as a moron as well as diagnosing his mental condition as psychotic.

The State of Oregon relinquished all claim to such portion of Warpouske's estate as consisted of unexpended federal pension funds, recognizing they were subject to recoupment by the federal government under the pro-

visions of 38 U.S.C. (1952 ed.) 450 and that their reversion to the United States was not a matter of contract but a revesting of a contingent reversionary interest reserved by the federal government in the grant of a pension to a pensioner.

The probate court found that Warpouske was not mentally competent to understand the consequences of his acceptance of hospitalization in hospitals operated by the Veterans' Administration nor competent to enter into any contract repecting any such hospitalization and, therefore, the provisions of 38 U.S.C. 17-17j, supra, did not control the disposition or vesting of his personal property. The court decreed the estate (except for the unexpended pension funds) escheated to the State of Oregon for the benefit of the Common School Fund. This decree was affirmed by the Oregon Supreme Court.

ARGUMENT

I

The Oregon Supreme Court's construction of 38 U.S.C. (1952 ed.) 17-17j as being a statute based upon contract is entirely consistent with an almost uniform line of judicial decision in both state and federal courts.

It is well established that this statute is based upon contract between the veteran and the Veterans' Administration: *In re Turner's Estate*, 1959, 171 Cal. App. 2d 591, 341 P. 2d 376; *In re Witte's Estate*, 1953, 174 Kan. 360, 255 P. 2d 1039; *United States v. Stevens*, 302 U. S. 623, 82 L. ed. 484; *United States v. Security-First National Bank of Los Angeles*, 1955, 130 F. Supp. 521; *United*

States v. Brown, 1952, 110 F. Supp. 370; *Mauck v. United States*, 94 F. 2d 745; *Abbott v. Morgenthau*, 93 F. 2d 242; *In re Gonsky's Estate*, 79 N. Dak. 123, 55 N.W. 2d 60; *In re McGhee's Estate*, 268 N.Y.S. 79; *United States v. Essex Co.*, 44 F. Supp. 476; *O'Connell v. United States*, 37 F. Supp. 832; *United States v. Gallagher*, 97 F. Supp. 1014.

Examination of the provisions of 38 U.S.C. 17-17j, supra, discloses that the statute is couched in the language of contract and is intended to be founded upon contract. Section 17 speaks of "acceptance" of care and treatment as constituting an "acceptance" of the terms and conditions of the subchapter, with the effect of an "assignment", effective at the veteran's death, of the personal assets in the veteran's estate. Section 17g directs the Administrator of Veterans' Affairs to provide for an application form for hospital treatment which shall include notice of the provisions of the statute and for posting of the notice of the statutory provisions in the buildings where the veterans are housed. The purpose of these provisions is to lay the foundation for contract which may be accepted by veterans being admitted to the hospital by execution of the application for admission, or, as to patients already in a hospital, by remaining and accepting further treatment.

The cases cited, supra, illustrate the contractual character of the provisions of this statute and that the vesting of the veterans' personal property in the United States is not a matter of escheat or automatic vesting. Such in fact was the position taken by the federal gov-

ernment in *In re Witte's Estate*, 1953, 174 Kan. 360, 255 P. 2d 1039, 1044, which was stated as follows:

"* * * Its [United State's] principal argument however is that the statute is not one of escheat or of the control of who shall receive a decedent's estate, but *one providing for a contract, and that it bases its claim on a contract authorized by and executed under the statute.* In support it relies principally on United States v. Stevens, 302 U.S. 623, 58 S. Ct. 388, 82 L. ed. 484. * * *" (Emphasis supplied)

Again in *United States v. Stevens*, 302 U.S. 623, 628, 82 L. ed. 484, 488, mentioned in the Witte case, the government based its claim under this statute on contract:

"There is no ambiguity in the contract or in the Act which authorized it. * * *

"The *contract*, however, is valid under the applicable state law. * * *

"The claim of the Government is *based on a contract* between the veteran and the Home. * * * *Both parties were competent to make the contract.* This contract is valid and enforceable * * *." (Emphasis supplied)

Likewise in *United States v. Security-First National Bank of Los Angeles*, 130 F. Supp. 521, 522, the federal government rested its claim on contract:

"* * * The Government claims that on the death of Morris, it became the owner of this deposit by virtue of a *contract between the deceased and the Veterans Administration* * * *." (Emphasis supplied)

While § 17a speaks of a conclusive presumption of contract arising out of the fact of death of a veteran in a veterans' facility or hospital, this provision must be

read in context in relation to the subchapter as a wh
as well as in relation to the law of contract generally.
fact this section expressly states that the presumpti
shall be subject to the conditions of the subchapter. Th
there must be an *acceptance* of care or treatment by t
veteran which shall constitute an *acceptance* of the p
visions and conditions of the subchapter which shall ha
the effect of an *assignment*. An "acceptance" conte
plates a person mentally competent and capable of a
cepting. A valid contract can arise only where a perso
capable of contracting. *Dexter v. Hall,* 82 U.S. 20,
L. ed. 73; *German Savings and Loan Soc. v. DeLashmu*
(C.C.,D. Or.) 67 F. 399; *Graham v. Allen,* 116 Or. 501, 2
P. 1007. The presumption of contract arising under t
section must necessarily presuppose a person capa
of contracting.

That the validity of a contract arising under this st
ute is subject for judicial inquiry with respect to t
capacity of veterans admitted to a hospital was obser
in *United States v. Security-First Nat. Bank of L*
Angeles, supra (130 F. Supp. 521, 522), at page 522
follows:

> "No party has challenged the validity of t
> agreement on the ground that there was no agr
> ment as to the footnoted matter, and although a fo
> note to an application for admission to a hospital is n
> an exemplary way to establish privity of contract
> the absence of challenge, it is sufficient. Consider
> that applicants for domiciliary care in a hospital a
> usually sick and often lacking acute mental p
> ception, the force of a footnote to the entry appli
> tion (the footnote purporting to create a special co

tract of unusual character) might be considerably diminished, and frequently destroyed by a careful inquiry into the circumstances of the execution of the application for domiciliary care. * * * That contracts of this character may be valid if properly entered into, is firmly established by Supreme Court adjudication."

A different underlying theory exists with respect to the vesting in the United States of the unexpended federal veterans' pension funds in the estate of a veteran dying in a Veterans' Administration facility intestate and without heirs, under the provisions of 38 U.S.C. (1952 ed.) 450. The intent and meaning of this statute is that the pension is a qualified gratuity in which the federal government has retained for itself a contingent reversionary interest. The following cases are illustrative of the reversion of accumulated unexpended veterans' pensions and benefits to the federal government: *In re Lindquist's Estate,* 25 Cal. 2d 697, 144 P. 2d 438, 154 P. 2d 879; *Coakley v. Attorney General,* 318 Mass. 508, 62 N.E. 2d 659.

Petitioner for writ of certiorari has cited *In re Skriziszouski's Estate,* 382 Pa. 634, 116 A. 2d 841; *In re Gonsky's Estate,* 79 N.D. 123, 55 N.W. 2d 60; and *In re Bonner's Estate,* 192 Misc. 753, 80 N.Y.S. 2d 122, as being at variance with the Oregon Supreme Court decision. These cases were analyzed and discussed in the Warpouske opinion, 352 P. 2d 539, 547, 548, in the light of the different basic theories underlying 38 U.S.C. 17-17j and 38 U.S.C. 450, the Oregon court pointing out at page 547 that some courts had failed to observe the important dis-

tinction between the two theories. Also in the cases cited by petitioner, all the incompetent veterans apparently were under guardianship as was likewise the situation in *Estate of Maguire*, 13 D & C 2d 247, 7 Fiduc. Rep. 701 (Orphan's Court of Philadelphia County), cited in the petition for certiorari.

The Warpouske case, because of its unique facts, applies only to that narrow class of cases where mentally incompetent veterans, incapable of contracting, dying intestate and without heirs in a veterans' hospital are brought into the hospital without having a relative or a guardian of person to act for them or a court order for their commitment to the hospital. Since it is well established that 38 U.S.C. 17-17j, supra, is founded upon contract, the statute can not apply to such incompetent veterans thus involuntarily admitted. The result reached by the Oregon court in Warpouske's estate would apply only to narrow the class of such veterans and not to all incompetent veterans who might be cared for in Veterans' Administration hospitals or institutions.

II

It being well established that the provisions of 38 U.S.C. (1952 ed.) 17-17j are based upon contract, the second question presented by the petition concerning the constitutionality of a provision having a self-operating effect in the vesting in the United States of an incompetent veteran's property is hypothetical.

The cases have repeatedly viewed the statute as based upon contract. Its purpose was to provide a form of stat-

utory contract and not to effect a self-operating succession or devolution to the United States of the personal property of a veteran dying intestate and without heirs in a Veterans' Administration facility.

The recent case of *In re Turner's Estate*, 171 Cal. App. 2d 591, 341 P. 2d 376, 379, 1959, points out the nature of the statute as follows:

> "* * * This statute is not an attempt to regulate and control the devolution of property, but is based upon *contractual relationships*. United States v. Gallagher, D.C.S.D. Cal., 97 F. Supp. 1014; In re Witte's Estate, 174 Kan. 360, 255 P. 2d 1039, 36 A.L.R. 2d 717; In re Gonsky's Estate, 79 N.D. 123, 55 N.W. 2d 60; See United States v. Stevens, 302 U.S. 623, 58 S. Ct. 388, 82 L. Ed. 484; Mauck v. United States, 9 Cir., 94 F. 2d 745." (Emphasis supplied)

The federal government has itself taken the position that the statute is not one of escheat, as appears in *In re Witte's Estate*, 1953, 174 Kan. 360, 255 P. 2d 1039, 1044, supra, where the government's argument was as follows:

> "Its [United States'] principal argument however is that the statute is not one of escheat or of the control of who shall receive a decedent's estate, but *one providing for a contract, and that it bases its claim on a contract authorized by and executed under the statute*. In support it relies principally on United States v. Stevens, 302 U.S. 623, 58 S. Ct. 388, 82 L. ed. 484. * * *" (Emphasis supplied).

The right of states to control probate and the devolution of property and escheats within their own territories has long been recognized as a power belonging to the states. *Mager v. Grima*, 49 U.S. 490, 493, 12 L. ed. 1168; *United States v. Fox*, 94 U.S. 315, 320, 24 L. ed. 192. See

also *United States v. Security-First National Bank of Los Angeles*, 130 F. Supp. 521. No doubt this right of the States was carefully regarded by the Congress in framing the statute and resting it upon contract.

However, in view of the fact that it has been repeatedly held that the provisions of 38 U.S.C. 17-17j are contractual and even the United States has in the past taken the position that the statute is not one of escheat, the question presented as to the constitutionality of automatic vesting of the veteran's property is hypothetical inasmuch as the statute is one based on contract and not on the automatic vesting of property.

CONCLUSION

For the reasons advanced, the respondent submits that the petition for certiorari be denied.

Respectfully submitted,

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APPENDIX A

38 U.S.C. 17-17j (1952 ed.), the Act of June 25, 1910, 36 Stat. 736, as amended by the Act of December 26, 1941, 55 Stat. 868, provides in pertinent part:

§ 17. Vesting of undisposed personalty in United States as trustees for General Post Fund.

Effective ninety days after December 26, 1941, whenever any veteran (admitted as a veteran) shall die while a member or patient in any facility, or any hospital while being furnished care or treatment therein by the Veterans' Administration, and shall not leave surviving him any spouse, next of kin, or heirs entitled, under the laws of his domicile, to his personal property as to which he dies intestate, all such property, including money and choses in action, owned by said decedent at the time of death and not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund, a trust fund prescribed by section 725s (b)(45) of Title 31.

The foregoing provisions are conditions precedent to the initial, and also to the further furnishing of care or treatment by the Veterans' Administration in a facility or hospital. The acceptance of care or treatment by any veteran admitted as such to any Veterans' Administration facility or hospital after ninety days from December 26, 1941, and as well the continued acceptance of care or treatment furnished by the Veterans' Administration after said ninety days by any veteran who is then receiving the same shall constitute an acceptance of the provisions and conditions of this subchapter and have the effect of an assignment, effective at his death, of such assets in accordance with and subject to the terms and provisions of this subchapter and the regulations issued in accordance with and pursuant thereto.

§ 17a. Presumption from death in facility of contract for disposition of property.

The fact of death of the veteran (admitted as such) in a facility or hospital, while being furnished care or treatment therein by the Veterans' Administration, leaving no spouse, next of kin, or heirs, shall give rise to a conclusive presumption of a valid contract for the disposition in accordance with this subchapter, but subject to its conditions, of all property described in section 17 of this title owned by said decedent at death and as to which he dies intestate.

* * *

§ 17c. Disbursements from Fund; payment of creditors.

Disbursements from the General Post Fund shall be made by the Division of Disbursements, Treasury Department, upon the order and within the discretion of the Administrator of Veterans' Affairs for the benefit of members and patients while being supplied care or treatment by the Veterans' Administration in any facility or hospital, and this authority is not limited to facilities or hospitals under direct administrative control of the Veterans' Administration: *Provided, however,* That there shall be paid out of the assets of the decedent so far as may be the valid claims of creditors against his estate that would be legally payable therefrom in the absence of this subchapter and without the benefit of any exemption statute, and which may be presented to the Veterans' Administration within one year from the date of death, or within the time, to the person, and in the manner required or permitted by the law of the State wherein administration, if any, is had upon the estate of the deceased veteran; and also the proper expenses and costs of administration, if any: *And provided further,* That if the decedent's estate be insolvent the distribution to creditors shall be in accordance with the laws of his domicile, and the preferences and priorities prescribed thereby shall govern, subject to any applicable law of the United States.

§ 17d. Disposition of remainder of assets; acquisition of assets by the Administrator of Veterans' Affairs.

The remainder of such assets or their proceeds shall become assets of the United States as trustee for said Post Fund and disposed of in accordance with this subchapter. If there be administration upon the decendent's estate such assets, other than money, upon claim thereof within the time required by law, shall be by the administrator of the estate delivered to the Administrator of Veterans' Affairs or his authorized representative, as upon final distribution; and upon the same claim there shall be paid to the Treasurer of the United States for credit to said Post Fund any such money available for final distribution. In the absence of administration, any money, chose in action, or other property of the deceased veteran held by any person shall be paid or transferred to the Administrator of Veterans' Affairs upon demand by him or his duly authorized representative, who shall deliver itemized receipt therefor. Such payment or transfer shall constitute a complete acquittance of the transferor with respect to any claims by any administrator, creditor, or next of kin of such decedent.

* * *

§ 17g. Notice to veterans of law.

The Administrator of Veterans' Affairs shall prescribe a form of application for hospital treatment and domiciliary care which shall include notice of the provisions of this subchapter. Within ninety days after approval hereof similar notice shall be given to each veteran then receiving care in any facility or hospital as described in this subchapter: *Provided, however,* That this requirement shall be met by posting of said notice with a copy of the prescribed form in a prominent place in each building wherein patients or members are housed.

* * *

APPENDIX B

Oregon Revised Statutes 120.010

Immediately upon the death of any person who dies intestate without heirs, leaving any real, personal or mixed property, interest or estate in this state, the same escheats to and vests in the state, subject only to the claims of the creditors and as provided in ORS 120.060 to 120.130; and the clear proceeds derived therefrom shall be paid into and become a part of the Common School Fund of this state and be loaned or invested by the State Land Board, as provided by law.

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JAMES R. BROWNING, Clerk

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v.

STATE OF OREGON, ACTING BY AND THROUGH THE STATE LAND BOARD, AND PORTLAND TRUST & SAVINGS BANK, ACTING BY AND THROUGH THE STATE LAND BOARD

IN THE MATTER OF THE ESTATE OF ADAM B. WARPOUSKE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR THE UNITED STATES

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